

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES PHILIP DOUGLAS,

Petitioner,

v.

ROBERT S. MASKO,

Respondent.

No. C09-5439 RJB/KLS

ORDER DENYING MOTIONS FOR
APPOINTMENT OF COUNSEL AND
FOR DISCOVERY

This 28 U.S.C. § 2254 petition has been assigned to United States Magistrate Judge Karen L. Strombom pursuant to 28 U.S. C. § 636(b)(1) and Local MJR 3 and 4. Petitioner has filed motions for the appointment of counsel and for discovery. Dkts. 30 and 31. After careful review, the court finds that both motions should be denied.

There is no right to have counsel appointed in cases brought under 28 U.S.C. § 2254 unless an evidentiary hearing is required, because the action is civil, not criminal, in nature. See *Terravona v. Kincheloe*, 852 F.2d 424, 429 (9th Cir. 1988); *Brown v. Vasquez*, 952 F.2d 1164, 1168 (9th Cir. 1992); and Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts. An evidentiary hearing has not been granted in this case and the claims in

1 the petition are adequately set forth and articulated. Petitioner has not yet demonstrated that an
2 evidentiary hearing is necessary or that he is entitled to one.

3 Petitioner also requests “unfettered access to his court files and transcripts.” Dkt. 31.
4 Respondent submitted the relevant state court record on May 10, 2010. Dkt. 24-2.

5 Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court’s
6 power to upset a state court’s adjudication of a criminal case is very limited. A federal court
7 shall not grant a habeas petition with respect to any claim adjudicated on the merits in the state
8 courts unless the adjudication either: (1) resulted in a decision that was contrary to, or involved
9 an unreasonable application of, clearly established federal law, as determined by the Supreme
10 Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts
11 in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d). A determination of a
12 factual issue by a state court shall be presumed correct, and the applicant has the burden of
13 rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. §
14 2254(e)(1).
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16 Rule 5(c) of the rules governing § 2254 cases provides that the respondent shall indicate
17 in the answer to a habeas petition what transcripts are available and what proceedings have been
18 recorded but not transcribed. The State must attach to its answer any parts of the transcript it
19 deems relevant. Once this is done, the court, on its own motion or upon request of the petitioner
20 may order that further portions of the existing transcripts be furnished or that certain portions of
21 the non-transcribed proceedings be transcribed and furnished. Rules Governing Section 2254
22 Cases in the U.S. Dist. Cts., 28 U.S. C. Pt. VI, ch. 153, Rule 5 (emphasis added); *Simental v.*
23 *Matrisciano*, 363 F.3d 607, 612 (7th Cir. 2004). As noted by the *Simental* court, on habeas
24 review, except in limited circumstances, the district court does not make independent factual
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1 determinations. *Id.* citing 28 U.S.C. § 2254(e); *United States ex rel. Green v. Greer*, 667 F.2d
2 585, 586 (7th Cir. 1981) (an examination of a record is not required if the petitioner fails to
3 identify any incompleteness or inaccuracies in the facts before the district court.)

4 The Ninth Circuit's holding in *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985),
5 requiring that the district court examine all relevant parts of the state court record, is not
6 inconsistent with these holdings or Rule 5. Under Rule 5, the determination of relevance is left
7 to the discretion of the respondent. A demand for further documentation can only be executed by
8 court order *sua sponte* or by request of the petitioner. § 28 U.S.C.A. 2254, Rule 5, Advisory
9 Committee Notes, 1976 Adoption. Upon such a request the burden is placed on the petitioner to
10 prove to the court that the excluded materials requested are relevant and necessary. When a
11 dispute concerning relevance arises, the burden is on the petitioner to prove to the court that the
12 excluded materials are necessary for the petition. *Richmond v. Ricketts*, 640 F.Supp. 767 (Ariz.
13 1986).

14 Petitioner does not specify whether the relevant state court record provided by
15 Respondent is deficient or that it excluded materials that are relevant and necessary. If the
16 Petitioner is alleging insufficiency of evidence to support factual findings, then 28 U.S.C. §
17 2254(f) provides that the burden shifts to Petitioner to produce those parts of the record pertinent
18 to his claims. That subsection further states that if the Petitioner, because of indigency or other
19 reason is unable to produce such part of the record, then the State shall do so and the court shall
20 direct the State to do so by order directed to an appropriate State official. *Id.* The subsection
21 further provides that if any of the pertinent record cannot be provided, the court shall determine
22 under the existing facts and circumstances what weight shall be given to the State court's factual
23 determination. *Id.*

1 Included in Respondent's submission of relevant state court record, are the judgments
2 and sentences, orders establishing conditions of release, and the state court briefing and rulings.
3 Dkt. 24-2.

4 Petitioner has not provided an explanation of how and why any of the records he is
5 requesting are necessary for this court's analysis of his claims on the merit.
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7 Accordingly, it is **ORDERED** Petitioner's motions for the appointment of counsel and
8 for discovery (Dkts. 30 and 31) are **DENIED**.

9 DATED this 15th day of June, 2010.
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12 Karen L. Strombom
13 United States Magistrate Judge
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